

THE RECORDER

Supreme Court Leans Toward Defendants on Insured Medical Damages

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Justice Joyce Kennard, California Supreme Court
Jason Doiy / The Recorder

SAN FRANCISCO — The California Supreme Court sounded ready today to tilt toward defendants on a question that comes up in virtually every personal injury case.

In *Howell v. Hamilton Meats & Provisions*, the court is tackling the question of whether prevailing plaintiffs can recover the full price of their medical care even if their insurers paid only a smaller negotiated amount.

Chief Justice Tani Cantil-Sakauye has authored a plaintiff-friendly appeal court decision in one of the cases that's waiting on the high court's decision in *Howell*. Her colleagues on the court granted review in that case, **King v. Willmet**, S186151, in October, before she was confirmed by voters as the next chief justice.

But amid a firing squad of questions directed toward Gary Simms, the lawyer arguing for plaintiff Rebecca Howell, not even Cantil-Sakauye sounded like a sure thing for plaintiffs today.

The courtroom was packed for the *Howell* oral argument; the case has drawn a couple dozen *amici curiae*, and hundreds of millions of dollars annually in California rides on the outcome.

The underlying accident occurred in 2005, when the driver of a Hamilton Meats & Provisions truck made an illegal U-turn on a coastal highway in Encinitas and struck Howell. At trial, a jury awarded her damages in the full amount of her medical bills. But the trial court judge cut that amount by about \$130,000 to \$60,000 — the amount her insurers actually paid for her care.

Howell contends that she is entitled to the full amount of her medical bills, and not just the smaller amount that her insurance company negotiated with her medical providers.

Hamilton Meats, represented by **Robert Tyson Jr.** of La Jolla's **Tyson & Mendes**, argued that plaintiffs and their attorneys shouldn't benefit from the "windfall" of a larger medical bill that was never actually incurred.

Cantil-Sakauye said hospitals write off some portion of plaintiffs' medical bills. "What do we call that if not incurred on behalf of the plaintiff?" she asked Tyson.

"The reality is, that was never incurred," Tyson replied.

Sitting by assignment in the case, California's most senior court of appeal justice, Joan Dempsey Klein, was the only one telegraphing strong support for the plaintiff's position.

Klein repeatedly returned to the idea that an insured person should benefit from her thrift — the same conclusion that the Fourth District panel came to in 2009 when it reversed the trial court decision to reduce the medical special damages that the jury awarded Howell. In other words, by virtue of the fact that Howell had paid for health insurance, her insurers were able to negotiate lesser payments for her medical care, but defendants shouldn't get to benefit from her having faithfully paid health insurance premiums.

Klein directed a question at Greines, Martin, Stein & Richland partner Robert Olson — who argued on behalf of *amicus curiae* the Association of Southern California Defense Counsel — that seemed to be directed at her colleagues: "Are we going to penalize this plaintiff for having paid insurance premiums for God knows how many years?"

But the other justices pummeled Simms. Several grew exasperated when he refused to be pinned down on the question of whether his client is on the hook for the full amount that her medical care cost.

"Was she out \$130,000?" Justice Joyce Kennard asked.

Not hearing a satisfactory response, Kennard fired off another series of questions: "Again, how is your client harmed? What detriment has your client suffered?"

Simms tried to answer, and Justice Ming Chin repeated the question of whether Howell has to pay the \$130,000.

"She may have to," Simms answered.

"What is your client out of pocket for?" a frustrated Kennard asked. "I don't think you're giving straight answers to Justice Chin."

Justice Carol Corrigan then asked whether there was anything in the record to show that Howell paid out-of-pocket for any of her medical bills.

"We don't know what the providers accepted in full in this case," Simms said.

Though the larger battle appears to be tilting toward defendants, Simms may have scored a procedural victory for his client on the use of a so-called *Hanif* motion, as the justices seemed to consider limiting the use of such motions.

Defendants use the post-trial motion, following a 1988 court of appeal decision in *Hanif v. Housing Authority*, to ask trial courts to reduce jury awards for past medical expenses to the amount that their insurers actually paid for the care.

Several of the justices asked whether the case should be sent back for a rehearing on the question of the value of medical expenses paid and incurred, and, in general, whether juries shouldn't weigh such evidence during trials.

"Why wouldn't that be determined by qualified experts?" Klein asked.

"It would be," Simms said.

"Exactly," Klein replied.

A decision in *Howell v. Hamilton Meats*, S179115, is due within 90 days.

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